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No. 84-1110

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

40 EASTCO,

Petitioner,

-against-

THE CITY OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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March 4, 1985

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QUESTION PRESENTED

Where a developer asserts a claim for a taking based upon a zoning change reducing by 28% the maximum permissible bulk for new buildings, are the developer's mere allegations that the change has defeated its expectations and rendered the return available on its property less-than-reasonable sufficient to survive a summary judgment motion, in light of the facts that:

(a) the developer makes no contention that its property has been rendered unprofitable or has lost most of its value;

(b) the developer concedes that the zoning change permits it to erect an office building of 30-odd stories and concedes that many nearby office buildings undertaken or completed shortly before the bulk reduction are of similar size;

(c) the developer acquired its parcel during the time in which the bulk reduction proposal was under active consideration; and

(d) the City never guaranteed the developer that it would be allowed to fulfill its plans?

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STATEMENT OF THE CASE

(1)

In the late 1970's, government officials, business leaders, and members of the general public in New York City began to voice concern that the east side of midtown Manhattan was becoming

seriously overbuilt (A94).* They feared that consequential worsening street and traffic congestion, increasing strain upon mass transit facilities, and, in general, decreasing environmental quality threatened the continued viability of the area (A53, A55, A60-89). Unless overdevelopment was checked, they feared, inhospitable conditions would eventually induce businesses based in the area to leave the City and cause property values in the area to decline (A55). As the president of Macmillan Publishing, a corporation based in the east side midtown area stated: "Stabilization ... is more than simply good planning strategy. It is an

*Numerical references in parenthesis prefaced by the letter "A" are to pages of the Joint Appendix in the Second Circuit Court of Appeals. Those prefaced by "PA" are the petitioner's appendix in this Court.

absolute and immediate necessity if the [area] is to continue functioning as an effective business and commercial center" (A55).

In response to this concern, the New York City Department of City Planning undertook a comprehensive review of midtown Manhattan zoning regulations and, in 1980 and 1981, disseminated reports recommending that those regulations be amended so as to divide midtown into (1) stabilization, (2) growth, and (3) preservation sectors (A23-24, A30). The re-zoning plan called for reducing the maximum permissible bulk in sectors slated stabilization while increasing the maximum permissible bulk in sectors slated for growth (A24). The midtown east side region -- which had suffered from overbuilding -- was to be largely designated for stabilization, while the midtown west side region --in which development had lagged --was to be largely designated for growth (A24).

The Department of City Planning thereafter drafted appropriate amendments to the New York City Zoning Resolution and to the official New York City Zoning Map (A25). Among the stated goals of the amendments were the following:

- "[t]o strengthen the business core of Midtown Manhattan by improving the working and living environments"

- "[t]o stabilize the East Side of Manhattan and provide direction and incentives for expansion to the west and to the south"

- "[t]o link future Midtown growth and development to improved pedestrian circulation, improved pedestrian access to rapid transit facilities, and avoidance of conflicts with vehicular traffic"

- "[t]o promote the most desirable use of land and building development in accordance with the district plan for Midtown

> and thus conserve the value of land and buildings and thereby protect the City's tax revenues."

N.Y.C. Zoning Res. §81-00(a), (b), (c), (e).

The amendments were the subject of numerous public hearings and intensive review and debate (A25). They became effective on May 13, 1982, when they were approved by the New York City Board of Estimate (A25).

(2)

Petitioner 40 Eastco owns (partially in fee and partially as lessee) a parcel of land in the sector of the east side of midtown Manhattan designated for stabilization under the amended zoning regulations (A3). It acquired its parcel piecemeal between March of 1978 and June of 1982 -- during the time in which the zoning change was under active consideration (A10-12). Under the old zoning scheme, the maximum permissible floor area ratio

for new buildings on its parcel was 18 (A11).* An amended building permit issued in April of 1982 provided for a structure of nearly this maximum bulk (A11).

Under the revised zoning scheme, the maximum permissible floor area ratio for petitioner's parcel was reduced to 13 -- a reduction of 28% (A6). Because of the inconsistency between the permit and the revised bulk limitation, the City revoked petitioner's permit -- prior to construction -- upon adoption of the zoning change (A9).

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*The bulk of a building is measured by its "floor area ratio," which is computed by dividing the total number of square feet "floor area" on all of its floors by the number of square feet in the zoning lot. "Floor area" is the gross area exclusive of elevator space, loading berth space, and other nonproductive space.

In September of 1982, petitioner commenced the instant action for declaratory and injunctive relief against the City in the United States District Court for the Southern District of New York (A1-21).* It contended, inter alia, that the zoning change unconstitutionally deprived it of property without just compensation by preventing construction of buildings of sufficient size to generate reasonable investment returns and consequently destroying the property's economicvalue (A10-12). Petitioner did not challenge the soundness of the zoning revision or contend that the revision was discriminatory. Further, while the complaint alleged that the zoningchange prevented realization of reasonable investment returns, conspicuously absent was any

*A similarly situated plaintiff, Park Avenue Tower Associates, joined in the suit. Although it also joined in 40 Eastco's appeal to the Court of Appeals, it apparently has decided against seeking a writ of certiorari.

allegation that the change entirely precluded the realization of profit.

In October of 1982, the City moved, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss the complaint for failure to state a claim upon which relief can be granted (A22). The City submitted an affidavit by a registered architect to the effect that the new zoning scheme permitted petitioner to construct a building of at least 30 stories and probably more (A31-32, A34). The architect further stated that the allowable 30-odd story office building was, in size, within the range of midtown office buildings that had recently been completed or upon which construction had recently begun under the old -- more generous --zoning scheme (A32). The City argued that the just compensation clause does not guarantee reasonable investment returns and that, in light of the facts attested to by the architect, the adverse economic impact of the zoning change upon

petitioner was not so devastating as to amount to a taking. Petitioner did not contest the architect's conclusions and, indeed, submitted no factual material whatsoever in response to the City's motion (Aiv). It relied soley upon a memorandum of law (Aiv).

In accordance with Rule 12(b)(6), Judge Vincent L. Broderick of the United States District Court for the Southern District of New York considered the factual material that the City had submitted and treated the City's motion as one for summary judgment (A101). Judge Broderick found that it was factually undisputed that the new zoning scheme permitted petitioner to construct a very substantial building (A107-8). In light of this fact, he held that the adverse economic impact upon petition was not so egregious as to constitute a taking, notwithstanding the unavailability of a reasonable investment return (A108-29).

Accordingly, Judge Broderick granted summary judgment in favor of the City.

(4)

In its appeal to the United States Court of Appeals for the Second Circuit, petitioner argued that the District Court had employed an incorrect legal standard, since any zoning change that prevents realization of a reasonable investment return and frustrates investment-backed expectations constitutes a taking as a matter of law. In addition, it contended that summary judgment was improperly granted because of the existence of an issue of material fact as to the extent of its economic harm.

While acknowledging that a zoning change that destroys economic viability may constitute a taking, the Court of Appeals rejected petitioner's assertion that economic viability signifies reasonable profitability, citing this Court's statement in Andrus

v. Allard, 444 U.S. 51, 66 (1979), that "loss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a taking claim (PA-6a-8a)." Petitioner's position, the Court of Appeals stated, is likewise inconsistent with several of that Court's own cases holding that, in analyzing economic impact for taking purposes, it is not profitability but marketability that is determinative (PA-8a-9a). Furthermore, the Court stated, petitioner's argument is further undermined by the legion of cases that have upheld as against taking claims regulations that devalued property by as much as 90% (PA-9a). Common sense, the Court stated, also militates against petitioner's position, since that approach unfairly rewards those who overpay for their property and encourage frequent sales of property at each appreciation in order to lock in progressively larger investment values (PA-10a).

Having rejected petitioner's legal theory, the Court of Appeals next turned to the question of whether summary judgment was nevertheless improperly granted because of the existence of an issue of material fact as to the presence of a taking (PA-11a). Petitioner's complaint, the Court stated, did not allege that the zoning change entirely prevented petitioner from profiting on its investment (PA-11a). Rather, its only pertinent factual allegation was that the zoning change prevented realization of a reasonable investment return and hence destroyed the property's economic value (PA-11a). Since the first allegation was insufficient to make out a taking claim, since the second was rebutted by the architect's affidavit that the City submitted, and since petitioner submitted no factual material to counter the architect's conclusions, there was no reason why summary

judgment should not have been granted (PA-11a-12a).

(5)

On October 24, 1984, petitioner, citing this Court's grant of certiorari in Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir.), cert. granted, 53 U.S.L.W. 3202 (1984), moved in the Court of Appeals for an order extending its time to petition that Court for rehearing until 14 days after decision by this Court of Hamilton Bank. By order entered on November 1, 1984, Judge Lawrence W. Pierce denied the motion, stating: "Hamilton appears not be controlling."

REASONS FOR DENYING A WRIT OF CERTIORARI

POINT I

THE COURT OF APPEALS FOLLOWED THE APPLICABLE PRINCIPLES OF LAW ESTABLISHED BY THIS COURT IN ITS PRIOR DECISIONS IN VIEWNG PETITIONER'S ALLEGATIONS AS INSUFFICIENT TO BAR THE AWARD OF SUMMARY JUDGMENT AGAINST PETITIONER.

(1)

Petitioner contends that the Court of Appeals departed from this Court's precedents in slighting petitioner's allegations that the zoning change (1) prevented petitioner from reaping a reasonable investment return and (2) frustrated petitioner's investment expectations. In fact, this Court's precedents clearly establish that one cannot make out a colorable taking claim by bare showings of decreased profitability and disappointed expectations.

It is certainly true that economic harm is a pertinent consideration in judging whether regulatory action effects a taking. See, e.g., Ruckelshaus v. Monsanto Co., _____ U.S. _____, 104 S. Ct. 2862, 2874 (1984). To warrant a taking finding, however, economic harm must be exceedingly severe. Mere loss of profitability -- let alone the less severe loss of reasonable profitability claimed by petitioner -- hardly suffices. As this Court stated in Andrus v. Allard, 444 U.S. 51 66 (1979), in explaining why a regulation entirely prohibiting certain commerce in artifacts did not effect a taking even if it prevented traders from deriving economic benefit from their artifacts:

> [L]oss of future profits -- unaccompanied by any physical property restriction -- provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further,

> perhaps because of its uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.

This Court has also rejected taking challenges to a brickmaking restriction that devalued commercial property by 93% in Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915), and to an industrial use restriction that caused a 75% property devaluation in Village of Euclid v. Ambler Realty Corp., 272 U.S. 365, 384 (1926). It is unthinkable that the properties in those cases could have withstood such enormous diminutions in value while retaining reasonable profitability.

Moreover, the implications of the proposition that retention of reasonable profitability is the sine qua non for rejection of a taking claim, are astounding. Every regulatory action by government -- ranging from the establishment of container

requirements for the shipment of aardvarks to the promulgation of insecticide restrictions for zucchini -- has an adverse effect upon the profitability of some enterprises. If petitioner's theory were the law, then any enterprise whose pre-regulation profitability is no more than "reasonable" and whose profitability is at all adversely affected by regulation could claim a taking.

Petitioner's argument concerning interference with investment expectations was also properly found to be deficient by the Court of Appeals. Noticeably absent from its petition is any reference to Ruckelshaus v. Monsanto Co., supra, which contains this Court's most recent and most detailed exposition of how investment expectations factor in a taking analysis. Among the issues in Monsanto was whether the use by the Environmental Protection Agency of Monsanto's trade secret pesticide data for the benefit of competitors as well

as EPA's public disclosure of such data effected a taking of Monsanto's property. After noting that "'interference with reasonable investment-backed expectations'" is a factor in taking analysis, 104 S.Ct. at 2875 (quoting another case), the Court proceeded to apply this factor to the different factual situations that prevailed during three different periods in which Monsanto submitted data to the EPA. The law in effect during one submission period, the Court stated, expressly provided for data use and disclosure. Id. Accordingly, the Court held that Monsanto had no reasonable investment-backed expectations of secrecy as to data submitted during that period. Id. The Court stated:

> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when

> EPA acts to use or disclose the data in a manner that was authorized by law at the time of submission.

Id. Nor, the Court held, was there an interference with reasonable investment-backed expectations as to data submitted during a second period, in which the applicable law neither expressly permitted nor expressly forbade disclosure. Id. at 2876. As to that period, the Court reasoned:

> [A]bsent an express promise, Monsanto had no reasonable, investment-backed expectation that its information would remain inviolate in the hands of EPA. In an industry that long has been the focus of great public concern and significant government regulation, the possibility was substantial that the Federal Government, which had thus far taken no position on disclosure . . ., upon focusing on the issue, would find disclosure to be in the public interest.

Id. at 2876. With regard to data submitted during a third period, in which applicable law prohibited disclosure, a taking finding was warranted, the Court held. Id at 2877. The Court reasoned, "This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." Id. at 2878.

Thus, the teaching of Monsanto is that to qualify as reasonable investment-baked expectations for taking purposes, one's expectations must be founded upon an explicit governmental guarantee. In the case at bar, petitioner can point to no such guarantee. To be sure, petitioner may have had hopes when it acquired its property that the applicable zoning regulations would not be changed. However, given the fact that the law then in effect and still in effect specifically permits zoning changes, see N.Y.C. Charter § 200, any such hopes were no more reasonable then hopes of

confidentiality that Monsanto may have harbored as to data submitted during the first of the above-discussed three periods. Nor can petitioner rely upon the fact that the City issued it building permits. Under long-established New York law, issuance of a building permit confers no rights that survive a subsequent inconsistent zoning change, unless, between issuance of the permit and passage of the change, the holder completes a substantial portion of the planned construction in reasonable reliance upon the permit. See Sibarco Stations, Inc. v. Town Board of Vestal, 24 NY2d 900, 249 NE2d 478 (1969); Smith v. Spiegel & Sons, Inc., 31 AD2d 819, 298 NYS2d 47 (2d Dep't), aff'd, 24 NY2d 920, 249 NE2d 763 (1969); Gramatan Hills Manor, Inc. v. Manganiello, 213 NYS2d 617 (Sup. Ct. West. Co. 1961) (n.o.r.); Riverdale Comm. Planning Ass'n v. Crinnion, 133 NYS 2d 706 (Sup. Ct. Bronx Co. 1954) (n.o.r.), aff'd, 285 App. Div. 1047, 141 NYS2d

510 (1st Dep't 1955). Given this principle and given the fact that petitioner did not perform the requisite substantial construction, the permits can hardly be construed as a guarantee against re-zoning.

(2)

Entirely ignoring this Court's decisions in Andrus and Monsanto, petitioner seeks to establish that its allegations were sufficient to make out a colorable taking claim by citing this Court's earlier decisions in Agins v. City of Tiburon, 447 U.S. 255 (1980), and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978).

Nothing in those decisions supports petitioner's view. It is true that this Court stated in Agins that a zoning law that snuffs out "economic viability" effects a taking. 447 U.S. at 260. Nowhere in the decision, however, is "economic viability" equated with "reasonable profitability." Furthermore, the

decision nowhere implies that the phrase "reasonable investment expectations" embraces ill-founded subjective desires.

Penn Central likewise does not aid petitioner. That case identified the "primary expectation" protected by the just compensation clause as the expectation of continuation of long-existing uses. 438 U.S. at 136. Nor do the opinion's references to reasonable return substantiate petitioner's position. Penn Central came to the Supreme Court with a finding by the State Court of Appeals that the challenged ordinance permitted a reasonable return. The Court of Appeals was obliged to resolve the question of whether a reasonable return was available because the ordinance in question explicitly guaranteed property owners the right to earn a reasonable return. 438 U.S. at 110, 112n. 13. It is true that this Court did not wholly ignore the Court of Appeals' finding and, indeed, cited the

finding in support of its conclusion that no taking had occurred. See id., at 136. However, this Court's citation of the availability of a reasonable return as one among the many factors militating against a taking finding hardly suggests that the availability of a reasonable return is necessary to avoid a taking finding. Indeed, petitioner's inference is no more sound than the inference that all non-millionaires qualify for public assistance from a case citing the fact that an individual is a millionaire in upholding that person's ineligibility for public assistance.

Even if Agins and Penn Central are at all ambiguous concerning the significance of reasonable profitability and frustration of expectations for taking purposes, the subsequent Andrus and Monsanto cases -- which must be deemed to reflect this Court's current thinking on taking jurisprudence -- explode petitioner's interpretation.

Petitioner assails the Court of Appeals for suggesting that, in assessing economic harm for taking purposes, retention of some market value is the primary consideration. The Court of Appeals' statement is in accord with this Court's precedents. Thus, for example, this Court stated in Ruckelshaus v. Monsanto Co. that "'[governmental] action short of acquisition of title or occupancy'" constitutes a taking only "'if its effects are so complete as to deprive the owner of all or most of his interest.'" 104 S.Ct. at 2874 (emphasis added) , quoting from United States v. General Motors Corp., 323 U.S. 373, 378 (1945). Equally telling is this Court's summarization in Penn Central Transp. Co. v. City of New York, supra of three precedents in which taking claims were upheld. It stated that the statute in one case "had nearly the same effect as the complete destruction of rights claimant had

reserved." 438 U.S. at 127 (emphasis added; citation omitted). In addition, in the same paragraph, it referred to a second case with the capsulized description "Government's complete destruction of a materialman's lien in certain property held a "'taking'" and to a third case with the capsulized description "if height restriction makes property wholly useless ... compensation is required." 438 U.S. at 128 (emphasis added; citations omitted). See also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 84 (1980) (taking only when deprivation of something "essential to the use or economic value of ... property").

In any event, even if the test suggested by the Court of Appeals is overly harsh, we fail to see how petitioner is aggrieved. Petitioner concedes the impelling need for the zoning change in order to preserve the desirability of the east side of midtown Manhattan. Further, petitioner concedes that the

zoning change permits it to construct an office building of 30-odd stories -- a building whose size is within the range of recently undertaken nearby office buildings. Moreover, petitioner makes no allegation that the zoning change deprived its property of most of its value. For that matter, petitioner does not even allege that the zoning change rendered its property unprofitable. Rather, petitioner's only allegations are that the zoning change interfered with its plans and prevented it from realizing a "reasonable" rate of return. Under these circumstances, the degree of harm sustained by petitioner pales by comparison with the harm involved in cases such as Hadacheck v. Sebastian, supra, which rejected taking claims. Accordingly, petitioner's allegations could not possibly make out a colorable taking claim even under a somewhat more liberal standard.

POINT II

THE HOLDING OF THE COURT OF APPEALS DOES NOT CONFLICT WITH HAMILTON BANK V. WILLIAMSON COUNTY REGIONAL PLANNING COMM'N. FURTHER, SINCE THERE IS NO REASON TO BELIEVE THAT THIS COURT'S DECISION IN HAMILTON WILL AFFECT THE OUTCOME IN THE CASE AT BAR, THE PETITION SHOULD NOT BE HELD IN ABEYANCE BUT RATHER SHOULD BE DENIED OIUTRIGHT.

(1)

Petitioner glibly asserts that "[t]he standard for determining whether an unconstitutional taking occurred applied by the Sixth Circuit [in Hamilton Bank v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir.), cert. granted, 53 U.S.L.W. 3202 (1984)] was whether the owner could develop its property under the new zoning at a reasonable return or profit." Pet. at 5. Petitoner does not cite to any page of the Hamilton opinion for this proposition. The reason for the lack of

citation is that the proposition finds no support in the opinion. On the contrary, the standard that the Hamilton Court employed was one quite akin to that employed by the Court of Appeals in the case at bar -- retention of market value. Thus, the Hamilton Court stated:

> The appraiser's conclusion, therefore, was that the land had no remaining significant value. As there was convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use.

729 F.2d at 406. Similarly, the Hamilton Court took pains to note:

> Since the evidence is that the land owned by Hamilton was left with no remaining significant value, the case is distinguishable from those cases in which mere diminutions in value have been held not to constitute taking because economically viable use remained.

Id. at 406 n.4 (emphasis in original).

Petitioner also asserts that Hamilton's property must necessarily have retained market value and that the Hamilton Court's upholding of a taking finding notwithstanding such a retention conflicts with the view of the Court of Appeals in the case at bar. Pet. at 6. Petitioner apparently is unaware of the fact that Hamilton offered substantial testimony to the effect that its property retained no significant value and that its attempts at selling the property had been futile. See Brief for Respondent at 19-20, Williamson County Regional Planning Comm'n v. Hamilton Bank, No. 84-4 (Sup. Ct.). Given the fact that a jury found in Hamilton's favor on the economic viability issue, 729 F.2d at 404, the operative standard of review required that the Sixth Circuit Court of Appeals view the evidence in the light most favorable to Hamilton and give it the benefit of all reasonable

inferences. See Continental Oil Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). Petitioner's premise that Hamilton's property retained marketability is, accordingly, false.

Finally, petitioner asserts that the Hamilton Court accorded far greater weight to investment expectations then did the Court of Appeals in the case at bar. Pet. at 5. Hamilton's expectations were, however, far more solidly grounded than those of petitioner in the case at bar. Undergirding Hamilton's expectations was the fact that during a six-year period in which the developers had built roads, installed utility lines, and spent some five million dollars on property improvements, the locality approved the developers' plans on numerous occasions. 729 F.2d at 403. Further, the locality continued to approve the developer's plans following passage of the zoning change. Id. Indeed, not until three years after the zoning change became

effective did the locality give the developers any inkling that the change would present an obstacle to their goals. Id. In contrast, in the case at bar, the City never gave petitioner reason to believe that the zoning change would not interfere with its project. Indeed, the City cancelled petitioner's permit immediately upon passage of the zoning change. Furthermore, unlike in Hamilton, petitioner in the case at bar essentially engaged in speculation by assembling its properties during the time in which the zoning change was being publicly discussed. As a sophisticated developer, it must have known that the possibility existed that the zoning change would pass and that its plans would accordingly not come to fruition. Moreover, unlike the developers in Hamilton Bank, petitioner did not undertake substantial construction in the aftermath of governmental approval.

(2)

Petitioner's request that this Court defer action on its petition until after decision of Hamilton Bank should be denied because there is no likelihood that that decision will alter the outcome in the case at bar.

To begin with, inasmuch as the result that the petitioner Planning Commission seeks in Hamilton Bank is reinstatement of the j.n.o.v. in its favor granted by the District Court but upset by the Court of Appeals (see Br. for Pet. at 34, Williamson County Regional Planning Comm'n v. Hamilton Bank, No. 84-4 (Sup. Ct.)), the major focus of this Court's opinion will necessarily be whether the District Court was correct in holding that the impossibility of a taking finding when there is an estoppel finding and, in any event, the unavailability of damages for a temporary taking required the granting of a j.n.o.v.. Should this Court side with the District Court on either issue, its inquiry will be over, as

such a ruling would give the Planning Commission the result that it seeks. Accordingly, there is little chance that Hamilton Bank will even address the economic burden issue. Further, even if the Court addresses the issue, the strong possibility exists that it will not provide an elaborate treatment but will dispose of the issue summarily on the basis of the evidence that the property retained no significant value and that Hamilton Bank acquired a vested right -- evidence that distinguishes Hamilton Bank from the case at bar.

Even if this Court should elect in Hamilton Bank to provide a detailed treatment of the minimum economic burden necessary to establish a taking, there is no reason to believe that its treatment will be beneficial to petitioner in the case at bar. Given this court's recent Andrus and Monsanto decisions, which together contained a total of only one partial dissent, Hamilton Bank

would have to effect a monumental change in taking jurisprudence to render petitioner's mere claims of less-than-reasonable profitability and frustration of subjective expectations sufficient to make out a taking claim in the face of its freedom to erect a large building no smaller than many nearby ones. While Hamilton Bank may clarify the law, there is little likelihood that it will revolutionize it.*

*An additional reason why the petition should be denied is that the issue presented is not ripe for review. A property owner that has not availed itself of "opportunities. . . to . . . obtain relief by requesting a variance" cannot challenge the constitutionality under the just compensation clause of the application of a zoning change to particular property. Hodel v. Virginia Survace Mining and Reclamation Ass'n, 452 U.S. 264, 295-97 (1981). In the case at bar, petitioner might well have applied to the New York City Board of Standard and Appeals for a variance. See N.Y.C. Charter §666(b); N.Y.C. Zoning Res. §§72-01, 72-21. Indeed, the Board is legally required to grant a variance where a property owner establishes that a zoning change prevents realization of a reasonable return, provided that certain other criteria are satisfied. Id. § 72-21. It is undisputed that petitioner made no such application.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE DENIED.

March 4, 1985

Respectfully submitted,

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